FOND DU LAC RESERVATION
BUSINESS COMMITTEE
LEGAL AFFAIRS OFFICE

DENNIS J. PETERSON, ATTORNEY AT LAW
LAURIE A. OLSON, LEGAL ASSISTANT

105 UNIVERSITY ROAD, CLOQUET, MINNESOTA 55720
(218) 879-4593
FAX (218) 879-4146

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U. S. EPA REGION 5
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October 16, 1995

Mr. Valdas V. Adamkus
Regional Administrator
Region 5
United States Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

Re: Comments on State and County objections to tribal jurisdiction over nonmembers within the Fond du Lac Reservation.

Dear Mr. Adamkus:

This is to provide a response on behalf of the Fond du Lac Band to the objections submitted by the Minnesota Pollution Control Agency (MPCA) and the county attorneys of Carlton and St. Louis counties regarding the exercise of jurisdiction by the Fond du Lac Band over nonmembers within the Fond du Lac Reservation under the Clean Water Act.

The September 1 letter of the MPCA makes the following assertions: (1) that the Fond du Lac Band has failed to establish that nonmember activities within the Reservation would have a "demonstrably serious effect" upon the health and welfare interests of the Band within the meaning of Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 431 (1989)(interpreting Montana v. United States, 450 U.S. 544, 565-66 (1981)); (2) that state law sufficiently protects whatever tribal interests there are in the regulation nonmember activities; and (3) that the mutual regulatory interests of the Band and the State can only be effectively administered through a cooperative agreement between the state and tribal governments. See Letter of MPCA Commissioner Charles W. Williams, September 1, 1995 and "Attachment A." Each of these arguments are addressed below.

1. **The Appropriate Application of the Montana and Brendale Decisions to Tribal Water Quality Regulation.** The MPCA correctly recognizes that the inherent authority of the Fond du Lac Band to regulate its own members and territory precludes state jurisdiction, and that there is

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a jurisdictional conflict between the Band and the State concerning the extent of tribal jurisdiction over nonmember activities on fee lands within the reservation. Under Montana v. United States, tribal regulation of the activities of nonmembers on reservation fee land depends upon whether the activity to be regulated has a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, supra, 450 U.S. at 566.[1]

However, it must be noted that the particular holdings of Montana and Brendale, involving tribal hunting and fishing regulation and zoning of nonmembers on fee lands within a reservation, respectively, are of little precedential value in assessing tribal interests in water quality regulation on the reservation. The ambient properties of water make the fee status of the land on which an activity affecting reservation water quality practically irrelevant, and make "checkerboard" approaches to regulation impracticable. Virtually every pollution-generating activity on the Fond du Lac Reservation has a direct and potentially serious effect on the health and welfare of the Fond du Lac Band.

A state has no regulatory authority over tribal lands within the reservation, see, e.g., Washington Department of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985); in contrast, "[t]ribal jurisdiction over the activities of non-Indians on reservation lands . . . presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 18 (1987)(citing Montana, supra, et al.). The only feasible means of achieving a uniform, comprehensive and effective regulatory regimen within the Reservation is through tribal regulation. The EPA has long recognized "tribal governments as the appropriate non-federal

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[1] The MPCA relies upon Brendale in asserting that tribal regulation of nonmember activity on reservation fee land requires that the conduct at issue be "demonstrably serious and must imperil" the political integrity, economic security, or the health or welfare of the tribe. Id., Attachment A at p. 1 (citing Brendale, supra). However, Brendale was a plurality decision, and the Band maintains that the second exception in Montana v. United States remains the applicable standard: i.e. that the tribe must merely demonstrate "some direct effect" on tribal interests. Montana, supra (emphasis added). The continuing vitality of the second Montana exception is demonstrated by South Dakota v. Bourland, ____ U.S. ____, 113 S.Ct. 2309 (1993), in which the Court employed the "direct effect" standard of Montana and not the "demonstrably serious" standard of Brendale. See id., ____ U.S. at ____, 113 S.Ct. at 2320. We believe the "direct effect" inquiry of Montana to be the appropriate, objective measure of protected tribal interests, particularly when read against the backdrop of tribal sovereignty and the federal policy of promoting tribal self-government over reservation lands. Naturally, tribal impact must have some substantiality in order to be protectable. In any event, the importance of water quality to health and habitability would presumably satisfy the stricter Brendale standard when there ia a demonstrable, direct effect on tribal interests.

parties making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace," EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), and the Agency particularly recognizes that Congress has expressed a preference for tribal regulation of reservation waters. See 56 Fed. Reg. 64878 (1991). When considered in this context, granting TAS status to the Fond du Lac Band for the purposes of establishing water quality standards for the Fond du Lac Reservation is the most efficient means of protecting the welfare of the residents of the Reservation, Indian and non-Indian alike, in a manner which is consistent with applicable federal law.

2. **Nonmember Activities on Fee Lands within the Reservation Adversely Affect Water Quality to the Detriment of Tribal Interests and Are Not Adequately Regulated By State Law.** The MPCA asserts that the Band's application "fails to allege any facts demonstrating that non-Band member activities on non-Indian lands within the Reservation have a demonstrably serious effect that imperils the health and welfare of the Band," and that State regulation of reservation waters adequately protects the Band's interests Id., Attachment A, p. 2. To the contrary, there are numerous fee land activities within the Reservation which have a direct and serious effect on tribal interests within the meaning of United States v. Montana, and which are not adequately regulated, including the following:

   (1) The abandoned ditch system on the southwestern part of the Reservation causes fluctuations of water levels which seriously damage and impede the wild rice crop, an historical food staple of Band members.[2] Continuing present-day ditching and filling of wetlands and watersheds on non-trust lands within the Reservation exacerbates this problem. These activities thus present a direct threat to the welfare and economic security of the Band;

   (2) There are many obsolete private septic systems on fee lands within the Reservation, especially adjacent to Big Lake, which is the most important recreational use area within the Reservation. These septics contribute to the eutrophication process in the lake and have an adverse effect upon tribal welfare;

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[2] The MPCA's characterization of the wild rice crop on the Reservation as having "cultural significance" to the Band, see Attachment A at p. 10, misses the point and illustrates the manner in which environmental self-regulation by the Fond du Lac Band would effectively reflect and protect the interests of the Band. Wild rice is not some quaint tribal custom, but is an important means of subsistence for hundreds of Indian families on the Reservation whose maintenance is protected by the Treaty of 1854. The Band possesses unique knowledge and expertise in wild rice maintenance and restoration which is not generally possessed by the State. See, e.g., "The Puzzling Loss of Wild Rice," Minnesota Volunteer (July 1993).

(3) Pesticide, fertilizer and herbicide use on fee lands within the Reservation run-off into Reservation waters and threaten tribal health, welfare and economic security through their effects upon the duck and fish populations and upon the wild rice crop; and

(4) Run-off waters from the various gravel pit operations on the Reservation carry heavy, unnatural loads of sediments and minerals into nearby waters and adversely effect tribal health, welfare and economic security.

Much of the MPCA's response is devoted to an illustration of the scope of its water regulatory system, whose inclusion is for the apparent purpose of demonstrating sufficient protection of tribal interests on the reservation by state regulation. See Attachment A at 3-10. Clearly, the State of Minnesota has developed a comprehensive water quality program which is of some benefit to the Fond du Lac Band. However, the need for uniform and comprehensive water quality regulation cannot be effectively or efficiently achieved through a "checkerboard" approach where two different governments are addressing two different aspects of the same problem. As the Supreme Court recognized in its Brendale decision, "Montana suggests that in the special circumstances of checkerboard ownership of lands within the reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or health or welfare of the tribe." Id., 492 U.S. at 430-31. This is clearly the case in the area of reservation water quality regulation, where the State has no jurisdiction over 55 percent of the reservation land base.

3. **The MPCA's Proposal for a Cooperative Agreement Should Be Pursued as a Supplement to Tribal Self-Regulation and Not as a Substitute For It.** The MPCA asserts that reservation water quality can best be protected through a cooperative agreement between the State and the Band. The Band recognizes the need for a long-term cooperative relationship with the State of Minnesota in the maintenance of water quality. However, it is important that such cooperative regulatory arrangements be undertaken on a level of parity, government-to-government, between the Band and the State, and that the Band's interests not be subsumed into the state regulatory scheme in a manner which relegates the Band to some kind of quasi-advisory status.

The longstanding policy of the EPA is to "work directly with tribal governments as independent authorities for reservation affairs, recognizing that they are not political subdivisions of States." 54 Fed. Reg. 49,181 (emphasis added). The Fond du Lac Band has direct, intimate familiarity with the resources of the Reservation, and should be the governmental entity which is responsible for the designation of water uses within the Reservation, for the approval of 401 permits, and for the protection of the wild rice waters within the Reservation, which has not been a priority of the State

in the past. The sovereignty of the Fond du Lac Band and its first-hand familiarity with the Reservation environment combine to require that the Band exercise a direct relationship with the United States in the implementation and maintenance of water quality standards on the Fond du Lac Reservation.

Thank you for your consideration of these issues. If you have any questions, please call.

Yours truly,

Dennis Peterson

Dennis J. Peterson
Tribal Attorney

cc: Reservation Business Committee

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